In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-53

MICHAEL EDWARD FRANCIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is reported at 457 F.2d 553.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1972. A timely petition for rehearing *en banc* was denied on May 10, 1972. The petition for a writ of certiorari was not filed until July 8, 1972, and it is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

475-125—72——1

QUESTION PRESENTED

Whether in denying petitioner reclassification as a conscientious objector the local Selective Service board adequately stated proper reasons for its determination.

STATEMENT

After a non-jury trial in the United States District Court for the District of Colorado, petitioner was convicted of failing to report for induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to the custody of the Attorney General for a period of two years, twenty months of which would be spent in service of national importance. The court of appeals affirmed *per curiam* (Pet. App. 1–4).

The essential facts are not in dispute. After registering with his local board in December 1964, petitioner was classified I–SH (high school student deferment), and upon entering college in the fall of 1965, he was classified II–S (college student deferment) on January 7, 1966. Petitioner was continued in Class II–S until November 5, 1969, when he was reclassified I–A because he had not earned sufficient college credits to be maintained in Class II–S.[1] On

[1] Realizing that his II–S deferment would be terminated, petitioner had previously written the local board asking to be placed in Class I–SC, a classification which would enable him to complete the academic year (SSF 14). The application, however, was premature. This classification is available only to students who have actually been ordered to report for induction during the school year. "SSF" refers to petitioner's Selective Service File, a copy of which is a part of the record filed with the Clerk of this Court.

November 6, 1969, the day after petitioner was reclassified I–A, the local board received a request from petitioner for a Form 150 application for conscientious objector status. Petitioner completed this form and returned it to the local board on December 4, 1969. It stated that his beliefs against participation in the Army and against violence were founded on the life and teachings of Christ, and that his beliefs had matured sometime prior to April 1968, when he joined the Church of Christ in Greeley, Colorado (SSF 23–23D).

Petitioner was invited to appear for an interview with the local board on March 3, 1970, to review his file and his conscientious objector Form 150. Following this interview, the board voted unanimously to retain him in the I–A classification. The classification was sustained by the Appeal Board, and petitioner was ordered to report for induction on July 8, 1970. The instant indictment and conviction followed his failure to comply with that order.

ARGUMENT

1. Petitioner's claim here and in the court of appeals focuses on a memorandum of the interview with the local board which was included in his file (SSF 33–33A).[2] The memorandum contained a detailed statement of petitioner's remarks and his responses to the questions put to him by the members of his local board. The concluding portion of the memorandum, at which petitioner directs his attack, reads as follows:

[2] A copy of this document is annexed hereto as an Appendix.

Summary and Decision of the Board. I–A Vote 4 to 0.

1. Left Church. Religion is not thoroughly understood.

2. Appears insincere in his I–O request. Possibly coached.

3. Could help a wounded man, but wouldn't in battle.

4. Decision to fill out SSS 150 and apply for I–O status came after he fell behind academically.

5. Won't take military orders. Appeals that he is against taking any orders.

Petitioner contends that his conviction should be set aside because the local board's denial of his claim to conscientious objector status could arguably be said to have been based on legally erroneous grounds.

The challenged comments essentially summarize petitioner's responses to questions asked of him by members of the board; they are, as the court of appeals found (Pet. App. 2), "a mixture of facts and conclusions," and, contrary to petitioner's claim, cannot fairly be construed as five independent grounds for the action taken. The court below properly concluded that, read as a whole, "[t]he summary * * * clearly indicates that the board found [petitioner] was not sincere in his beliefs" (Pet. App. 2–3). The summary recorded, for example, that petitioner had acknowledged that he had applied for conscientious objector status in part because he had "fallen behind in his studies". And although petitioner grounded his beliefs on the teachings of Christ and the Bible, he had "quit going to Church because they would not allow Organ Music to

be played at his wedding". And in answer to a question about his attitude toward World War II, he stated: "I feel that we did not need to be involved with the Japanese." And he also responded, when asked if he would help a wounded man, "If he were wounded in battle I could not." These responses provided the local board with an ample basis in fact to conclude that petitioner was not sincerely committed to his avowed opposition to military service on grounds of conscience.

2. Contrary to petitioner's argument, the administrative denial of exemption should not be declared invalid because the board's summary of petitioner's own remarks allegedly includes legally irrelevant points and it is impossible to know whether the board ruled on any such allegedly illegal grounds. See *Clay* v. *United States*, 403 U.S. 698. Petitioner's argument relies on three of the five statements included in the concluding section of the board's summary of the interview.[3]

The first is: "Left Church. Religion is not thoroughly understood". While "leaving church" would probably not, under *Welsh* v. *United States*, 398 U.S. 333, be a sufficient reason for concluding that the origin of conscientious pacificism was not "religious" within the meaning of the statute, that does not seem to be the point the board was making. Taken in context, this observation by the board bears on what the

[3] There is no challenge to the other two entries: "Appears insincere in his I-0 request. Possibly coached" (No. 2); "Decision to fill out SSS 150 and apply for I-0 status came after he fell behind academically" (No. 4).

court below properly concluded was the board's essential finding—that petitioner was not sincere in asserting his reasons for opposing military service.

Neither of the other two challenged statements, both of which accurately reflect the substance of the responses petitioner gave at his personal appearance, is either illegal or in conflict with the basic finding of insincerity. The notation, *i.e.*, "Could help a wounded man, but wouldn't in battle," does not, as petitioner contends, set forth an impermissible consideration that bears no relationship to conscientious objector status. The sincerity of such a position is something the board was entitled to doubt. But beyond that, it was reasonable for the board to emphasize such a position since its responsibility was to determine the *proper* classification to accord petitioner. The extent to which petitioner would be willing to help the wounded is certainly relevant to whether he should be assigned to Class I–A–O for noncombatant service. As petitioner states (Pet. 7): "Although the statute provides the same test for both I–O (objector to all military service) and I–A–O (objector to combatant service only)—opposition to participation in war in any form—the point of distinction between the two beliefs is the degree to which the registrant feels that service in a non-combatant capacity, such as medical corpsmen, infringes upon his beliefs." The board was entitled to record this assertion and find it insincere.

Also relevant to the classification determination, of course, was whether petitioner could in conscience

accept military orders; his negative responses to that question by the board are reflected in the fifth summary statement, *i.e.*, "Won't take military orders. Appeals [*sic*] that he is against taking any orders."

We recognize that the board's "Summary and Decision" is not a model for future cases, especially in light of the new statutory requirement for an administrative statement of reasons in support of each classification decision (50 U.S.C. App. (Supp. I) 471 a(b)(4)). Here, however, the board, although not then required by statute to do so, made a responsible effort to indicate in writing why it was denying petitioner's claim. Unlike the boards involved in *Clay* v. *United States, supra, Sicurella* v. *United States,* 348 U.S. 385, which gave no indication whatsoever of the grounds for their denials of exemption,[4] the board in this case summarized the information obtained during petitioner's personal appearance and, as we stated earlier, made it plain that its unanimous decision was premised on a finding of insincerity. The record does not anywhere suggest reliance upon an

[4] The fatal error in *Clay* and *Sicurella* was that the Department of Justice had, under the prior classification procedures (see 50 U.S.C. App. (1964 ed.) 456(j)), recommended that the conscientious objector claims be denied, basing the recommendation in part on an erroneous classification standard. Since the administrative boards followed the recommendations without stating which standard they had relied on, the courts could not determine whether the erroneous legal advice had controlled the administrative decision. By contrast, here the board did not have before it an improper standard; moreover, it did not simply announce its decision without suggesting the basis for its denial.

illegal classification standard; nor is there any cause to believe that petitioner's claim was considered unfairly at the administrative level.[5]

3. Title 50 U.S.C. App. (Supp. I) 471a(b)(4), which was enacted after the local board acted here, provides that in the event of a decision adverse to the claim of a registrant, the local board is required to furnish the registrant, upon his request, with "a brief written statement of the reasons for its decision." While it may be, as petitioner claims, that cases will arise involving the sufficiency of the statements provided pursuant to the statute, that issue is not involved in this case.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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[5] The cases cited by petitioner (Pet. 9) are not to the contrary. Unlike the instant case, those cases involved classifications by the local board or the appeal board based on stated reasons, some or all of which were erroneous, or upon erroneous advice from the Department of Justice, which in the absence of any stated reason rendered it impossible to determine whether or not the Board relied upon some legitimate ground.

APPENDIX

SELECTIVE SERVICE SYSTEM

LOCAL BOARD NO. 8

625 N. NEVADA

COLORADO SPRINGS, COLO. 80902

Michael Edward Francis. 5-8-46-1162. Personal App. March 3, 1970. 7:15 P.M.

Registrant is from an Army family who feels he is responsible for his actions and not his father or family.

Registrant states that Jesus Christ did not believe in violence.

Question: Do you interpret things the way you want to interpret them?

Answer. Yes—I believe in the Bible.

Question: Are you in opposition to all wars?

Answer. Yes.

Question: How do you feel about WW II?

Answer. I feel that we did not need to be involved with the Japanese.

Question: Would you help a wounded man?

Answer. If he were wounded in battle I could not.

Question: Would you do anything if you were attacked?

Answer. No, I would not do any act of violence—I would try to talk to my attacker.

Registrant was asked where his beliefs in non-violence began.

Registarant stated that his beliefs originated at Colorado State College and that he had been counseled by Ministers. Stated he is not affiliated with any

college or resistance groups. Registrant also stated that he is requesting a I–O classification, in addition to his beliefs, because has fallen behind in his studies and feels he is eligible for the I–O classification.

The board asked the registrant when he attended Church last. He stated the last time he attended Church was when he began student teaching.

Registrant stated he is a member of the Church of Christ. He also stated he quit going to Church because they would not allow Organ Music to be played at his wedding.

Registrant is presently in his 5th year of college and completing his Student teaching.

Board asked the registrant if he wanted to be in the Military in any form and would he go in as a I–A–O. Registrant replied No, because God does not want him to.

Board asked registrant if he could take Military Orders. Registrant said No.

No further questions. Registrant dismissed.

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SSS110 and 217 mailed to registrant.

R. W. SANDISON,
Chairman, Local Board No. 8.

U.S. GOVERNMENT PRINTING OFFICE: 1972